IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 09.10.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

A.S.No.477 of 1992

and

Cross Objection No.138 of 1993
and
Cross Objection No.34 of 1995

1. Kaliammal (D3)

2. Minor Jagannathan(D5)
rep by Kaliammal

3. Sadayammal (D6)

4. Minor Kothandapani (D7)
rep by Sadayammal

5. Minor Veerabadran (D8)
rep by Sadayammal .. Appellants in A.S.No.477/92
.. RR 1 to 5 in Cross Objection. 138/1993
.. RR 1 to 5 in Cross Objection. 34/1995
[Defendants 3, 5,6,7 and 8].

vs.

1. Poongavanam Ammal(Plaintiff) .. R1 in A.S.No.477/92
.. Cross objector in
Cross Objection No.138/93
[Plaintiff].
6th Respondent in Cr.Appeal No.34/95.

2. Angammal(D1) .. R2 in A.S.No.477/92
R.6 in Cross Appeal 138/93
R.7 in Cross Appeal No.34/95.

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3. Ramaling Gounder(D9) .. R3 in A.S.No.477/92
and R.7 in Cross Appeal 138/93.
.. Cross objector in
Cross Objection No.34/95

4. Perumal (D10) .. R4 in A.S.No.477/1992
R.8 in Cross appeal 138/93 and
34/95.

Prayer: The Appeal and both cross objections have been filed against the Judgment and Decree dated 27.03.1992, passed in O.S.No.81 of 1988 on the file of the Subordinate Court, Villupuram..

As per A.S.No.477/1992
For Appellant : Mr.Jinasenan
For Respondents : Mr. R.Subramanian for Mr.Ravichandra Babu
(For R1 & R2)
Mrs. Radha Gopalan (For R3)
Respondent No.4 : No Appearance.

COMMON JUDGMENT

This appeal as well as both the cross-objections have arisen out of the judgment and decree passed in O.S.No.81 of 1988 on the file of the Sub-Court, Villupuram, dated 27.03.1992. The suit was filed by the plaintiff, who is the daughter of the first Defendant, for partition of 7/15 share except Item No.14, 22 & 29 and for partition of 1/5 share in Item No.14, 22 and 29 in plaint 'A' Schedule property and also for declaration in respect of the plaint 'B' Schedule property.

2. The short facts of the plaintiff's case relevant for deciding the appeal are as follows:

2(a) The plaint schedule property belongs to one Marimuthu Gounder in a partition. The first Defendant-Angammal and the second Defendant-Thangammal, who is now no more, are the wives of Marimuthu Gounder. Plaintiff is the daughter of Marimuthu Gounder through the first Defendant-Angammal and D-3 & D-6 are the daughters of Marimuthu Gounder through the second Defendant-Thangammal.

2(b) Plaintiff's father Marimuthu Gounder had executed a settlement deed dated 22.08.1978 in favour of the plaintiff in respect of undivided 1/3 share in the 'B' schedule property. It was a registered settlement deed. The said settlement deed was acted upon by the plaintiff. In pursuance of the settlement deed patta has been issued in favour of the plaintiff and he is paying land tax also. As per the oral agreement entered into between the plaintiff and his father, plaint Item No.19 to 29 in 'A' Schedule properties were allotted towards the 1/3 share of the plaintiff and accordingly the plaintiff is in possession and enjoyment of Item No.19 to 29 of the plaint 'B' Schedule property.

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Marimuthu Gounder died on 17.08.1987 leaving his two wives and three daughters, who are D-1 to D-3, D-6 and plaintiff respectively. Except 'B' Schedule property in 'A' Schedule property D-1 to D-3, D-6 and plaintiff are each entitled to 1/3 share. Plaintiff is entitled to 1/3 share in plaint 'A' Schedule property except Item No.14, 22 & 29 and in respect of the remaining properties the plaintiff is entitled to 2/3 share. The plaintiff has filed the suit for 1/5 share in the suit property except Item No.14, 22 & 29 in 'A' Schedule property. D-3 & D-6 have sent a notice on 03.11.1987 claiming right in 'B' Schedule property also denying the right of the plaintiff in 'A' Schedule property. D-3 and D-6 claimed that they are entitled to 'A' Schedule property under settlement deed dated 23.02.1976 executed by Marimuthu Gounder. But the said settlement deed was not acted upon. The said settlement deed was cancelled by Marimuthu Gounder on 04.01.1977. Plaintiff has never made any attempt to trespass into the properties of the Defendants. Hence, the plaintiff has filed the suit for partition of his 1/5th share.

2(c) The first Defendant in her written statement has contended that she (D-1) is the legally wedded wife of Marimuthu Gounder(deceased) and the D-2 is not the legally wedded wife of Marimuthu Gounder. The second Defendant is a concubine of Marimuthu Gounder. The second Defendant had already married one Narayanan of Aakkanure and lived with him for five years and afterwards she came and joined with Marimuthu Gounder. Marimuthu Gounder and the second Defendant never lived as husband and wife and D-3 & D-6 are not the daughters of them. Marimuthu Gounder, while he was alive, executed a settlement deed on 22.08.1978 in respect of undivided 1/3 share and registered the same. Plaintiff is in possession of Item No.19 to 29 in 'A' scheduled property at Vengoor Village for the past ten years. After the death of the first defendant's husband on 17.08.1987, the plaintiff and the first Defendant alone are entitled to the suit property, as the legal heirs of the said Marimuthu. The first Defendant is entitled to ½ share in the property. Marimuthu had neither executed any settlement deed in favour of D-3 & D-6 nor executed any will in favour of D9. The said documents were never acted upon.

2(d) The second Defendant in his written statement would contend that the court fee paid by the plaintiff under Section 37(2) of the Court Fees Act is not correct. Marimuthu Gounder had married the second Defendant and in the wedlock D3 & D6 were born and the plaintiff is not the daughter of Marimuthu Gounder and the first Defendant. The first Defendant is the daughter of one Pavadai of Vadiang Kuppam. She was also given in marriage to Marimuthu. Within few years D-1 left the matrimonial home and began to live with one Puvathu Gounder. Afterwards she began to live with the said Marimuthu. The first Defendant had also filed M.C.No.31/88 on the file of the Sub-divisional Judicial Magistrate Court at Ullunthurpet under Section 488 of C.P.C now section 125 of C.P.C for maintenance. But the said petition was dismissed. The first Defendant later had intimacy with one Pattusamy on 23.01.1976 Marimuthu had executed a settlement deed in favour of his daughter. D-3 & D-6 have become entitled to 'A' schedule property. Thereafter, Marimuthu Gounder had no

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right in respect of the suit property. The ninth Defendant is the brother's son of Marimuthu Gounder and he had created a Will dated 23.02.1976 and without any right Marimuthu Gounder had executed a cancellation deed dated 4.1.1977. The plaintiff was never given undivided 1/4 share either on 22.08.1978 or on subsequent date. D-2, D-3 & D-5 are not aware about the issuance of patta in favour of the plaintiff. Defendants 3 to 8 have executed sale deed in respect of Item No.21 to 25 on 26.05.1988 in favour of D-10. Defendants 3 to 6 have issued suit notice on 03.11.1987, but the plaintiff has sent a reply containing facts which are untrue.

2(e) Defendants 3, 5 to 8 & 10 have adopted the written statement filed by the second Defendant.

2(f) The ninth Defendant in his written statement has contended as follows:-

The plaintiff has to prove that 'A' schedule property belonged to Marimuthu Gounder exclusively and he got the 'A' schedule property in the partition among his brothers. The marriage between Marimuthu Gounder and D-1 & D-2 are denied by the ninth Defendant. It is also denied that the plaintiff is the daughter of Marimuthu Gounder and the first Defendant. Defendants 3 and 6 are not daughters of Marimuthu Gounder through the second Defendant. The legally wedded wife of Marimuthu is one Sevathal. Defendants 1 to 3 & 6 are not the legal heirs of Marimuthu Gounder. The second Defendant was married to one Narayanan and while he was alive the second Defendant has developed illicit intimacy with Marimuthu Gounder and the first Defendant had married one Marimuthu of Periamani Anthal. The first Defendant had filed a petition against one Poovathoo Gounder before the Judicial Magistrate, Ulunthoorpet, which was dismissed. It is false to say that Marimuthu Gounder had married Defendants 1 and 2 some 40 years back. The third defendant's husband was one Pazhamalai. Plaintiff has not purchased 'B' schedule property from Marimuthu Gounder under sale deed date 22.08.1978. The said sale deed will not bind the undivided 1/3 share on Marimuthu Gounder. The plaintiff is not in possession of Item No.19. to 29 of the 'A' schedule property. Marimuthu Gounder died in the year 1987. Plaintiff, D-1, D-3 and D-6 are not the legal hires of Marimuthu Gounder. The ninth Defendant had conducted the last rituals of Marimuthu Gounder. On 16.02.1976 Marimuthu Gounder had executed a Will in favour of the ninth Defendant which is the last testament of Marimuthu Gounder. The third Defendant and the sixth Defendant have obtained a document from Marimuthu Gounder by deceiving him. The said settlement deed was cancelled by Marimuthu Gounder on 4.1.1977. The plaintiff is not entitled to 1/5 share also. The plaintiff is not in joint possession with Defendants 1 to 3 & 6. The patta, land tax and house tax were created for the purpose of this case. Item No.12 to 'A' schedule property belongs to Narayanasamy Gounder. Item No.2 of the plaint schedule property belongs to Angappa Gounder and Kesava Gounder, the father of D9. The ninth Defendant is residing in 0.33-3/4 cents in Item No.2 property. Remaining portion is in the possession of Kesava Gounder. The ninth Defendant is entitled to the entire Item No.3 and 5 of the plaint schedule property. There is no hut in Item No.6. But

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a well in Item No.6 is being enjoyed by the ninth Defendant and Kesava Gounder. The ninth Defendant is in possession of 2 ¼ cents and the remaining portion belongs to Keseva Gounder. The ninth Defendant is in possession of Item No.11 to 13 and a portion of Item No.10 and 23 to 'A' schedule property. The ninth Defendant is in possession of Item No.27 to 'A' schedule proprty measuring 65 cents. Hence, the suit is liable to be demissed.

3. After going through the pleadings the learned trial Judge had framed nine issues and on the basis of the documentary and oral evidence, the learned trial judge has passed a preliminary decree for plaintiff's 1/5 share in plaint 'A' schedule property and dismissed the suit in respect of 'B' Schedule property.

4. Aggrieved by the findings of the learned trial judge, the Defendants 3, 5 to 8 have preferred A.S.No.477/1992 and plaintiff has also preferred Cross Objection No.138/93 and ninth Defendant has also preferred Cross Objection No.34 of 1995.

5. Now the point for determination in this appeal and cross-objections is whether the decree and Judgment in O.S.No.81/1988 on the file of the Sub-Court, Villupuram, is liable to be set aside for the reasons stated in the memorandum of appeal?

6. The point:-

6(a) There are three sets of claim to the plaint schedule properties. Admittedly, the suit properties belong to one Marimuthu Gounder, who had two wives who are arrayed as D-1 and D-2 in the suit. The plaintiff is the daughter of the first Defendant and D-3 & D-6 are the daughters of the second defendant. The second Defendant died pending suit. The Defendants 3, 4 & 6 are legal heirs of the second Defendant. The ninth Defendant is the brother's son of Marimuthu Gounder.

6(b) The earliest document produced in the suit is Ex.B.2-Will dated 16.02.1976 in favour of the ninth Defendant alleged to have been executed by Marimuthu Gounder. Under Section 66 of the Evidence Act, a will is to be proved atleast by examining one of the attestors. P.W.4 is one of the attestors to Ex.B.2-Will. P.W.4's evidence was not accepted by the trial Court on the ground that P.W.4 in the cross-examination of Defendants 3, 4, 5 & 8, has deposed that the alleged Will-Ex.B.2 is a registered one. But Ex.B.2 is not a registered Will. P.W.4 has further deposed in his cross-examination that he had signed in the Will at the Sub- Registrar's Office. Yet another point for rejecting the evidence of P.W.4 by the learned trial Judge is that in the cross-examination for D9, P.W.4 had deposed that the testator Marimuthu Gounder was not lookedafter and maintained by D9-Ramalingam as directed in the Will. But immediately he would correct himself and say that Marimuthu was lookedafter by D9 and he had performed the last rituals of Marimuthu Gounder. Yet another point to reject Ex.B.2-Will is that D9 has taken Ex.A.18-sale deed from Marimuthu after execution of Ex.B.2-Will. Marimuthu Gounder had

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bequeathed all his properties under Ex.B.2-Will to D9, as per the recitals in the documents. If Ex.B.2-Will is a genuine one then there is no necessity for D9 to take Ex.A.18-sale deed from Marimuthu Gounder in respect of a portion of the suit property. The trial Court has assigned valid reasons at paragraph 11 of its Judgment for rejecting the Will on the ground that Ex.B.2-Wll dated 16.02.1976 was not proved.

6(c) Defendants 3 to 6 claimed right in respect of the suit properties under Ex.B.3-settlement deed dated 20.3.1976 said to have been executed within seven days from the date of Ex.B.2. But there is no mentioning about Ex.B.2-Will in Ex.b.3-settlement deed. Ex.B.3-Settlement deed was rejected by the trial Court assigning reasons at paragraph 11 of its Judgment. After Ex.B.3-Settlement deed there is no document like land tax receipt or patta to show that mutation has been effected subsequent to settlement. D3 to D6 have not produced any document. So the learned trial Judge correctly held that Ex.B.3 was not acted upon and the subsequent purchaser D10 under Ex.B.39 has also no right because D10's vendors D3 to D6 had no right to convey the property under Ex.B.39. So D3 to D6 cannot also claim any right in respect of the plaint 'A' schedule property under Ex.B.3-Settlement deed because Ex.B.3 was not acted upon by D3 to D6 as correctly held by the learned trial Judge.

6(d) The next document relied on by the plaintiff in the suit is Ex.A.3, another settlement deed dated 22.08.1978 said to have been executed by Marimuthu Gounder in respect of 'B' schedule property. While answering to issue No.1 at paragraph 8 of the Judgment, the learned trial Judge has elaborately discussed and assigned reason for not admitting Ex.B.3. To show that subsequent to Ex.A.3 patta has been issued, Plaintiff has produced Ex.A.4 patta. But on a perusal of Ex.A.4-patta will go to show that only in respect of S.No.44/29 joint patta has been issued in favour of D6, D9 and plaintiff. Ex.A.5-patta also shows that it was issued in favour of plaintiff, D3 and D6 in respect of Item No.17, 8, 9. Ex.A.6-patta is not for the suit property. The plaintiff has also not produced any document to show that Ex.A.3-settlement was acted upon. Under such circumstance only the learned trial Judge has rejected Ex.A.3 also. The learned trial Judge has correctly come to the conclustion that as far as plaint 'A' schedule property is concerned, the plaintiff, D1 to D3 and D6 are each entitled to 1/5 share in the 'A' schedule property as the legal representatives of Marimuthu Gounder. 'B' schedule property is Item No.14, 22 and 23 in 'A' Schedule property. While answering to issue 7 and 8 at paragraph 11 of the Judgment, the learned trial Judge has discussed about the 'B' Schedule property. Plaintiff only claims right under Ex.A.3-Settlement deed in respect of plaint 'B' schedule property since there is no evidence to show that Ex.A.3 was acted upon, the plaintiff is not entitled to claim any right in respect of plaint 'B' schedule property, as correctly held by the learned trial Judge. Hence, I hold on the point that the Decree and judgment passed in O.S.No.81/1988 on the file of the Sub-Court, Villupuram, need not be set aside for the reasons stated in the memorandum of Appeal.

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7. In the result, the Appeal as well as cross objections are dismissed confirming the Decree and Judgment passed in O.S.No.81/1988 on the file of the Sub-Court, Villupuram. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To,
1. The Subordinate Judge,
Villupuram.

2. The Record Keeper, VR Section, High Court, Madras.

+ 1 CC To Mr. A.Jenasenan, Advocate SR NO. 46898

+ 1 CC To Mr. K.Ravichandrababu, Advocate SR NO.46821

+ 1 CC To Mrs. S.Radha Gopalan, Advocate SR NO. 46851

A.S.No.477 of 1992
and
Cross Objection No.138 of 1993
Cross Objection No.34 of 1995

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